(2)

No. 99-439

In the Supreme Court of the United States

NATURE'S DAIRY, ET AL., PETITIONERS

v.

DAN GLICKMAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether milk producers may, consistent with the First Amendment, be required to fund a generic advertising and promotion program for fluid milk and dairy products under an agricultural marketing order similar to that upheld in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the judgment is noted at 173 F.3d 429 (Table). The opinion of the district court (Pet. App. 9a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1999. A petition for rehearing was denied on June 11, 1999 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on September 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Dairy and Tobacco Adjustment Act of 1983, Pub. L. No. 98-180, Tit. I, 97 Stat. 1136-1150 (codified at 7 U.S.C. 4501-4514 (1994 & Supp. IV 1998)) (Dairy Act), Congress declared that the "public interest" would be served by a "coordinated program of promotion" of milk and dairy products produced in the United States. 7 U.S.C. 4501(b). Congress perceived that such a program could "strengthen the dairy industry's position in the marketplace" and "maintain and expand domestic and foreign markets and uses" for its products. *Ibid.*

Accordingly, Congress directed the Secretary of Agriculture to promulgate a marketing order that would "provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, [and] for nutrition education." 7 U.S.C. 4504(a). The marketing order was to be administered by a National Dairy Promotion and Research Board (Dairy Board) composed of at least 36 members, all milk producers, to be appointed by the Secretary. 7 U.S.C. 4504(b).[1] The activities of the Dairy Board were to be financed by an assessment on dairy producers of 15 cents per hundred-

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[1] Only milk producers (defined in the statute as persons engaged in the production of milk for commercial purposes, 7 U.S.C. 4502(h)) are eligible to serve on the Dairy Board. The Secretary appoints members from among nominees submitted by organizations that have been certified to represent milk producers. 7 U.S.C. 4505. The Secretary may also appoint members to the Board other than from nominations of such certified organizations if the Secretary determines that a substantial number of milk producers are not members of, or their interests are not represented by, those organizations. 7 U.S.C. 4504(b).

weight of milk produced for commercial use. 7 U.S.C. 4504(g).[2]

In 1984, the Secretary, acting pursuant to the Dairy Act, promulgated the Dairy Promotion and Research Order (Dairy Promotion Order). See 7 C.F.R. Pt. 1150. The Dairy Promotion Order established the Dairy Board, delineated its powers and duties, and imposed an assessment, at the statutory rate of 15 cents per hundredweight, on all milk produced in the 48 contiguous States for commercial use. See 7 C.F.R. 1150.131, 1150.139, 1150.140, 1150.152.

Congress required the Secretary to conduct a referendum of milk producers in 1985 to determine whether the Dairy Promotion Order should remain in effect. 7 U.S.C. 4506. The Secretary is also required to conduct such a referendum whenever ten percent of milk producers request one. 7 U.S.C. 4507(b). In 1985 and again in 1993, a majority of milk producers voted in favor of the Dairy Promotion Order. See Pet. App. 3a.[3]

2. Petitioners are milk producers subject to the Dairy Promotion Order. In June 1996, they filed a complaint alleging that the mandatory assessments infringe their First Amendment rights of freedom of speech and freedom of association. Pet. App. 10a; Pet. 4.[4]

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[2] Assessments are actually collected by milk handlers, *i.e.*, persons who purchase milk from milk producers for processing. 7 U.S.C. 4504(g). A producer who markets his own milk is responsible for remitting the required assessments to the Dairy Board. *Ibid.*

[3] In addition, the Secretary may terminate the Dairy Promotion Order on his own initiative if he determines that the Order no longer "tend[s] to effectuate the declared policy" of the Dairy Act. 7 U.S.C. 4507(a).

[4] The original complaint and the first amended complaint sought an order enjoining the Secretary and the Dairy Board from

The matter came before the district court for resolution on cross-motions for summary judgment. The court found this case to be legally indistinguishable from *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), which held that the First Amendment was not implicated by a marketing order that imposed compulsory assessments on handlers of California peaches, nectarines, and plums to fund generic advertising of those fruits. Pet. App. 12a-13a. The court noted that *Wileman Brothers* had rejected each of petitioners' First Amendment arguments: *i.e.*, that a mandatory assessment for generic advertising "restrains producers from communicating some messages to some audiences," "compels producers to engage in actual or symbolic speech," and "compels the producers to finance disagreeable political and ideological views." *Id.* at 13a.

The district court, following this Court's analysis in *Wileman Brothers*, concluded that the generic advertising program established by the Dairy Act serves "legitimate economic purposes" as part of a regulatory scheme designed to "strengthen[] the dairy industry's position in the marketplace and maintain[] and expand[] markets and uses for fluid milk and dairy products." Pet. App. 14a (quoting 7 U.S.C. 4501(b)). The court also pointed out that the generic advertising program does

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collecting or spending assessments from petitioners and a refund of any assessments previously collected from petitioners. On the government's motion, the district court dismissed the action for lack of jurisdiction because petitioners had failed to exhaust their administrative remedies as mandated by the Dairy Act. 7 U.S.C. 4509(a). The court, over the government's objection, later granted petitioners leave to file a second amended complaint directly challenging the constitutionality of the Dairy Act itself. Pet. App. 10a n.1.

not "bar[] [petitioners] from using their own funds for advertising" or "require[] them to engage personally and directly in advertising." *Id.* at 14a-15a. Nor does the generic advertising program "restrict [petitioners'] right to communicate any message, compel [them] to engage in speech, or compel them to endorse any political views with which they disagree." *Id.* at 15a. Accordingly, the court held that the generic advertising program "clearly survive[d]" petitioners' First Amendment challenge. *Ibid.*

The district court rejected petitioners' attempt to distinguish this case from *Wileman Brothers* on the ground that the marketing order in that case comprehensively regulated the affected commodities, whereas the marketing order in this case deals only with promotion, research, and nutrition education programs. The court found "nothing in the *Wileman* opinion that would indicate that it is inapplicable to a stand alone program such as the Dairy Program." Pet. App. 12a. The court added that "[d]airy products, like tree fruit, are subject to extensive governmental regulation." *Ibid.* The court specifically identified the regulation of the prices received by dairy producers under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, and the regulation of milk price supports under the Federal Agricultural Improvement and Reform Act of 1996, 7 U.S.C. 7251 *et seq.* Pet. App. 12a-13a.

Accordingly, the court granted the government's motion for summary judgment and dismissed petitioners' complaint in its entirety. Pet. App. 17a-18a.

3. The Sixth Circuit affirmed in an unpublished opinion that adopted the district court's reasoning in full. Pet. App. 1a-8a.

The court of appeals, like the district court, found no "constitutionally significant distinction" between the generic advertising program upheld in *Wileman Brothers* and the generic advertising program challenged in this case. Pet. App. 7a. The court agreed that "the Dairy Promotion Program, similar to the program in [*Wileman Brothers*], is part and parcel of a legitimate regulatory scheme for promotion of commodities." *Ibid.* The court added that the dairy promotion program does not "impose any restraint upon a producer from communicating any message to any audience," require any producer "to engage in actual or symbolic speech," or "compel any producer to endorse or fund any political or ideological view." *Ibid.*[5]

ARGUMENT

The Sixth Circuit's unpublished decision is correct, is compelled by this Court's decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), and is consistent with the decisions of other courts of appeals. No reason therefore exists for this Court to revisit the constitutionality of federal programs requiring producers or distributors of an agricultural commodity to share the costs of its generic advertising. Indeed, the Court has twice since *Wileman Brothers* denied petitions for writs of certiorari in cases raising such issues. See *Goetz* v. *Glickman*, 119 S. Ct. 867

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[5] On appeal, the government renewed its argument that the district court lacked subject matter jurisdiction because petitioners had failed to exhaust their administrative remedies. The court of appeals upheld the district court's determination that petitioners were not required to exhaust administrative remedies because they were challenging "the constitutionality of the entire statute." Pet. App. 5a.

(1999); *Cal-Almond, Inc.* v. *Department of Agric.*, 119 S. Ct. 57 (1998).

1. This Court's decision in *Wileman Brothers* is dispositive of petitioners' challenge to the generic advertising program established by the Dairy Act. In *Wileman Brothers*, the Court held that regulations creating a generic advertising program for California peaches, nectarines, and plums, paid for by mandatory assessments on handlers of those fruits, did not implicate the First Amendment. The Court identified three factors that distinguish such generic advertising programs from laws that abridge freedom of speech in violation of the First Amendment. First, generic advertising programs "impose no restraint on the freedom of any producer to communicate any message to any audience." 521 U.S. at 469. Second, generic advertising programs "do not compel any person to engage in actual or symbolic speech," because persons "are not required themselves to speak, but are merely required to make contributions for advertising." *Id.* at 469, 471. And third, generic advertising programs "do not compel the producers to endorse or finance any political or ideological views." *Id.* at 469-470. The Court explained that requiring the members of an industry to pay assessments for generic advertising, which does not promote "any particular message other than encouraging consumers to buy [their product]," does not "engender any crisis of conscience" or otherwise interfere with any "freedom of belief." *Id.* at 471-472.

The generic advertising program in this case is, as the courts below recognized (Pet. App. 7a, 12a-13a), legally indistinguishable from the generic advertising program in *Wileman Brothers*. Both generic advertising programs are part of larger regulatory schemes for promotion, research, and consumer education involving

their respective commodities. Compare 7 U.S.C. 608c(6)(I) with 7 U.S.C. 4502, 4504 (1994 & Supp. IV 1998). Both generic advertising programs are implemented by committees of individuals in their respective industries and funded by assessments paid by members of those industries. Compare 7 U.S.C. 608c(6)(I), 610(b)(2)(ii) with 7 U.S.C. 4504(b) and (g). And both generic advertising programs provide mechanisms by which members of the industry can seek to modify or terminate those programs. Compare 7 U.S.C. 608c(16)(A)(i) and (B), 608c(15)(A) with 7 U.S.C. 4507(a) and (b), 4509. Accordingly, like the generic advertising program in *Wileman Brothers*, the generic advertising program here is simply "a species of economic regulation," 521 U.S. at 477, that does not warrant special First Amendment scrutiny.

2. Petitioners attempt (Pet. 5) to distinguish *Wileman Bros.* on the ground that the generic advertising program for milk and dairy products, as opposed to the generic advertising program for California tree fruits, "is not part of a broader collective enterprise." Petitioners' argument is both factually and legally untenable.

First, in the dairy industry, as in the tree fruit industry, Congress has "displaced many aspects of independent business activity." 521 U.S. at 469. As the Senate Report on the Dairy Act noted, "[f]ederal [regulatory] programs have been deeply imbedded in the economic fabric of the United States dairy industry for more than 40 years." S. Rep. No. 163, 98th Cong., 1st Sess. 13 (1983). The Senate Report specifically identified four such programs: "[t]he dairy price support program which explicitly puts a floor under the price of manufacturing grade milk and thus maintains a floor under all milk prices"; "[t]he milk marketing order

program which establishes minimum prices for fluid grade milk in most parts of the country"; "[i]mport controls which protect the price support program"; and "[f]ederal cooperative policy which encourages the development of farmer-owned cooperatives." *Ibid.*; cf. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 341-343 (1984) (describing the milk marketing order program); *Zuber* v. *Allen*, 396 U.S. 168, 172 (1969) (noting "the labyrinth of the federal milk marketing regulation provisions").[6]

Second, nothing in this Court's opinion in *Wileman Brothers* provides any justification for the distinction proposed by petitioners between marketing orders that deal only with promotion, research, and consumer education programs, as in this case, and marketing orders that regulate a commodity more comprehensively, as in *Wileman Brothers*. To the contrary, the Court granted certiorari in *Wileman Brothers* for the express purpose of resolving the conflict between the Ninth Circuit's decision in that case and the Third Circuit's decision in *United States* v. *Frame*, 885 F.2d 1119 (1989), cert. denied, 493 U.S. 1094 (1990). See 521 U.S. at 466-467. *Frame*, like the present case, involved a First Amendment challenge to a statute, the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901-2911, that deals only with "promotion and advertising, research, consumer information, and industry

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[6] Even the Dairy Act itself imposed regulations on the dairy industry aside from those at issue here. In particular, the Dairy Act established sliding levels of price supports for milk, directed the Secretary to provide a temporary reduction in the price received by producers for all milk marketed commercially, and required the Secretary to implement a paid diversion program. Pub. L. No. 98-180, § 102, 97 Stat. 1128 (codified at 7 U.S.C. 1446(d)(1) (Supp. I 1983)).

information" programs. 7 U.S.C. 2904(4)(B); see *Frame*, 885 F.2d at 1122-1123 (describing the Beef Act and noting that its "promotion and research programs" are "identical in most respects" to those for milk and dairy products under the Dairy Act and for six other commodities under other statutes). Surely, then, the Court understood *Wileman Brothers* as addressing the constitutionality not only of the particular generic advertising program in that case, but also of similar generic advertising programs involving other regulated commodities, whether those commodities are regulated by a single statute or marketing order or by multiple statutes or marketing orders.

Petitioners cite no decision of any court, and we are aware of none, adopting the distinction they propose between generic advertising programs established by marketing orders that regulate a commodity comprehensively and those established by marketing orders that regulate a commodity only in particular respects. The lower courts have relied on *Wileman Brothers* to sustain generic advertising programs established under statutes and marketing orders that deal only with promotion, research, and consumer education programs. See *Gallo Cattle Co.* v. *California Milk Advisory Bd.*, 185 F.3d 969, 974-978 (9th Cir. 1999) (rejecting a First Amendment challenge to the generic advertising program established by the State of California's Marketing Order for Research, Education and Promotion of Market Milk and Dairy Products); *Goetz* v. *Glickman*, 149 F.3d 1131, 1139 (10th Cir. 1998) (rejecting a First Amendment challenge to the generic advertising program established by the Beef Act), cert. denied, 119 S. Ct. 867 (1999). Indeed, in *Gallo Cattle*, a milk producer argued, as petitioners do here, that "because th[e] single marketing order [at issue] does

not regulate the milk producers to the extent that the marketing order in *Wileman* regulated the tree fruit growers, *Wileman* is inapplicable." 185 F.3d at 974-975 n.5. The Ninth Circuit rejected as "specious" the milk producer's "attempt to limit the focus to a single marketing order rather than the entire regulatory scheme," concluding that "[o]ur approach of focusing on the overall regulatory scheme rather than on whether all regulations are contained in a single marketing order is entirely consistent with *Wileman*." *Ibid.*

3. Finally, petitioners' complaints (Pet. 14) about the wisdom and efficacy of the dairy promotion program present no issue for the Court's review. As the court of appeals concluded, "in the absence of constitutional infirmity, this Court must defer to the judgment of Congress" that the dairy promotion program serves the public interest. Pet. App. 8a; see *Wileman Bros.*, 521 U.S. at 474 ("Although one may indeed question the wisdom of such a program, its debatable features are insufficient to warrant special First Amendment scrutiny."). Nor are petitioners without means to seek the termination or modification of the Dairy Promotion Order through the political process. See, *e.g.*, 7 U.S.C. 4507(b).[7]

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[7] While petitioners suggest (Pet. 3, 12-13) that the bloc voting procedures improperly influence the outcome of any producer referendum, they raised no direct legal challenge to those procedures in the courts below. In any event, the validity of such bloc voting procedures has been consistently upheld against a variety of legal challenges. See, *e.g.*, *United States* v. *Rock Royal Coop.*, 307 U.S. 533, 578 (1939); *Cecelia Packing Corp.* v. *United States Dep't of Agric.*, 10 F.3d 616, 621-625 (9th Cir. 1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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